No. 2719.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Before Judges GILBERT, ROSS and MORROW.

JOSEPH E. WISE and LUCIA J. WISE,

Appellants,

v.

CORNELIUS C. WATTS, *et al.*,

Appellees,

SANTA CRUZ DEVELOPMENT COMPANY,

Appellant,

v.

CORNELIUS C. WATTS, *et al.*,

Appellees.

BRIEF ON BEHALF OF WATTS AND DAVIS.

HERBERT NOBLE,
HARTWELL P. HEATH,
Attorneys for Watts and Davis.

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MEMORANDUM ON BEHALF OF APPELLEES CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.

While Watts and Davis respectfully submit that neither the petition of Joseph E. Wise and Lucia J. Wise for a rehearing nor that of Santa Cruz Development Company

for rehearing or for certification of questions to the United States Supreme Court show the basic grounds for a rehearing such as a failure of the Court to pass on any of the questions presented on the appeals or a misapprehension by the Court of any proposition properly before it or a decision subsequent to the argument and submission of the appeals by a higher court requiring a decision on any of the issues different from that arrived by this court, nevertheless it is believed that there are certain facts in connection with such applications to which the Court's attention should be directed.

As to the Petition of Joseph E. and Lucia J. Wise for Rehearing.

It contains many reckless and misleading statements such as (p. 3) "This Court, in its decision in this case, has not considered at all this vital question", meaning the claim of the Wises to title by prescription or adverse possession. Courts have often pointed out that counsel have no right to conclude that the court has not considered any question merely because it is not specifically mentioned in the opinion. In this case the court specifically said in its opinion (p. 33) :

> "The other points made by counsel have been carefully considered, but we do not think they require special mention."

In their answer the Wises had made this claim of title by adverse possession. It was the subject of exceptions

by the Wises, and it was fully argued in the briefs in the lower court and in this court. Consequently this must have been included among "The other points" to which the court made this express reference. It was expressly decided against the Wises by the lower court and necessarily decided and decided adversely to the Wises by this court which affirmed the decree of the lower court without modifying the decree as to its findings on adverse possession.

The decision is sound and well within settled legal principles and is sustained by numerous cases, some of which are cited in Watts and Davis' main brief (pp. 59-61) and in the Reply Brief of Santa Cruz Development Company (pp. 1-7, 13) and in that Company's Supplemental Brief (pp. 1-3) and the time of the Court will not be taken up by repeating what is there said on the subject.

Notwithstanding the statement quoted from the Wises' petition, that the court had "not considered at all" the question, the petition (p. 3) alleges:

> "The only defense to these suits in ejectment is the defense of adverse possession, for such period of time as to ripen into a title. This defense cannot be made by the Wises in the ejectment suits, because the decree of this court in the present case, is *res adjudicata* upon that defense. * * *"

Again the petition (p. 5) says:

> "the decree in this case * * * in effect adjudicates that neither of the Wises has any title to these two tracts of land."

These statements are clearly admissions that this court considered and decided the point.

Statement (p. 5) that "Long prior to 1899 the Government extended the public surveys over the tract described in the 1863 location" is inaccurate and misleading for the reason that according to our understanding of the matter there is no evidence in the record that the maps mentioned in the petition were made or authorized by the Government or that any government survey was made of this land until the one approved and filed December 14, 1914 segregating the land from the public domain. (*Stoneroad* v. *Stoneroad*, 158 U. S. 240.)

Another misleading statement or statements appear (pp. 4, 5) by which the impression is given that the Wises expended $30,000 in erecting a two-story brick dwelling on the 40 acre tract when the fact is that this building was erected long before the Wises made any claim to the possession of the property; that, to use a ~~court~~ expression the Wises jumped this property.

The statutes of limitation of Arizona quoted in the petition of the Wises have no application to an action like this for the reason that it is not within the description of "a suit or action to recover land or real property", such statutes only applying to actions in ejectment.

McCampbell v. *Durst*, 15 Tex. C. A. 522;
Knight v. *Valentine*, 35 Minn. 367.

We understand that the statute of limitations are quoted in the petition of the Wises for the purpose of

showing that an action in ejectment would not lie and hence the claim of adverse possession has ripened into title.

The petition admits (pp. 12, 14) that adverse possession can not ripen into title unless the correlative right to bring ejectment exists which it can not be said was the case here in view of the decision in *Stoneroad* v. *Stoneroad,* 158 U. S. 240.

United States v. Morrison, 240 U.S.192,199,210.

As to the Petition of Santa Cruz Development Company.

It is to be observed generally that it presents nothing new but merely repeats the arguments contained in the briefs filed on behalf of the Santa Cruz Development Company and contends for Mr. Brevillier's interpretation of the cases on which this court based its conclusions rather than that of the three experienced judges who heard, considered and decided the case.

This court correctly read the decisions in *Lane* v. *Watts.* The court there held beyond doubt that title passed out of the United States on the approval by the Commissioner of April 9, 1864, and that thereafter neither he nor his successors could exercise any jurisdiction over the land except to have it surveyed for the purpose of establishing its outboundaries and segregating it from the public domain. This necessarily included the holding that the 1866 location was made without authority and was void.

The point as to the right of the court to refer to the Wrightson bond is not well taken but is inconsequential

since the court had on perfectly sound grounds, concluded that the Hawley deed conveyed the 1863 location and merely referred to the Wrightson bond as supporting its conclusions.

Too Late to Ask that Questions be Certified.

The rule is established by a large number of cases that the certification of questions under Section 239 of the Judicial Code is a matter for the court, on its own motion, that it will not be done after the decision as that would be contrary to the purpose and intent of the provision and that it should be done only in cases of grave doubt.

An excellent statement of the principles on which the court will certify questions under this section of the Code and the time when it will be done is to be found in *Cella* v. *Brown,* 144 F., 742, at page 765, which the court is respectfully asked to read.

Other cases illustrating the application of the rule are:

Columbus Watch Co. v. *Dobbins,* 148 U. S., 266.
Dickinson v. *United States,* 174 F., 808.
German Insurance Co. v. *Hearne,* 118 F., 134.
Andrews v. *Nat. Foundry & Pipe Wks.,* 77 F., 774.
Louisville R. R. Co. v. *Pope,* 74 F., 1.
Fabre v. *Cunard S S. Co.,* 59 F., 500.
The Horace B. Parker, 74 F., 640.
Federal Statutes Annotated v. 2 *Supp.,* 1912, p. 1343, *et seq.*

In this case the decision having been made, it is too late to certify any question under Section 239 aforesaid; even if there had been any question in the case as to which the court had "grave doubts" which there was not, since the grounds on which the court's conclusions as to the Hawley deed and as to each and every question passed on are within settled principles of law in support of which the cases are numerous.

There is no occasion for a rehearing as to either the Wises or the Santa Cruz Development Company and the court has no authority *at this time* to certify any question to the Supreme Court.

We have read the brief submitted on behalf of the Bouldin Appellants and Appellees and will not further extend this brief.

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